EDITOR'S NOTE

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1986

No. 86-108 (7)

GARY HILTON, Superintendent,
New Jersey State Prison, Trenton, New Jersey
and W. CARY EDWARDS, JR., Attorney General
of New Jersey,

Petitioners,

v.

DANA BRAUNSKILL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court use this interlocutory matter as a vehicle for examining the holding in Carter v. Rafferty, 781 F.2d 993 (3rd Cir. 1986) in the absence of any showing by petitioners that there is any possibility that they can show "special reasons" for stay or revocation of respondent's enlargement even if the Carter interpretation of F.R.App.P. 23(c) and (d) is rejected in favor of their own?

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v.

DANA BRAUNSKILL,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Dana Braunskill, respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the order of the United States Court of Appeals for the Third Circuit entered in this case on May 27, 1986.

OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey in this matter is reported as Braunskill v. Hilton, 629 F.Supp. 511 (D.N.J. 1986).

STATEMENT OF THE CASE

Respondent adopts the statement of the case contained in the petition for certiorari* with one exception. Respondent was not convicted of aggravated sexual assault as charged in the indictment. Rather, he was acquitted of aggravated sexual assault and convicted of the lesser offense of second-degree sexual assault. N.J.S.A. 2C:14-2c.

Respondent also wishes to add the following: He was released from Trenton State Prison on May 20, 1986. Appellants' brief was filed with the United States Court of Appeal for the Third Circuit on June 23, 1986. Appellee's responding brief was filed on July 24, 1986. Counsel for respondent has been advised by the Clerk of the Third Circuit Court of Appeals that the case will be submitted to that court on October 27, 1986.

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* References to the appendix to the petition for certiorari in this brief will adhere to the form used in the petition itself ("App. ____"). References to the petition itself will be cited as "P___" with the appropriate page and line numbers.

REASONS FOR DENYING THE WRIT

Petitioners have requested that certiorari be granted in this matter in order to challenge the Third Circuit's refusal to consider en banc the interpetation of F.R.App.P. 23(c) and (d) set forth in Carter v. Rafferty, 781 F.2d 993 (3rd Cir. 1986), and to revoke respondent's enlargement, which took place on May 20, 1986. Respondent submits that this Court should deny the petition for certiorari because the orders entered below denying the motion for stay or revocation of respondent's enlargement turned primarily on this case's individual facts rather than on the legal reasoning that may or may not distinguish the Carter holding from other cases. Furthermore, even if this case is viewed solely as a straightforward application of Carter, that case presents an interpretation of the scope of Rule 23(c) and (d) that is faithful to relevant precedent, amply supported by common sense and logic, and not in conflict with decisions of other circuits.

Even a cursory reading of the petition for certiorari should convince this Court that petitioners' legal arguments exist entirely in a vacuum; the reasons put forth for granting the writ do not include any serious argument whatsoever that the instant matter presents a situation "in which the prisoner is shown to be a danger to the community and the chances of reversal on appeal are great." (P 13-12 to 15) Yet surely in an interlocutory matter of this sort, the petitioner should have the burden of showing (or, at least, the evidence when fairly viewed should disclose) that the result below might be different if their interpretation of Rule 23(c) and (d) were adopted by this Court and the case was remanded for further proceedings. "We do not

suggest that district courts should grant even brief 'turn-around' stays when appeals are frivolous, or when justice requires that no further delay take place." LaFrance v. Bohlinger, 487 F.2d 506 (1st Cir. 1973). Petitioners' apparent reluctance to discuss the record set forth in the appendices to their petition is understandable because it is clear that respondent's enlargement could not and would not be stayed or revoked even if the very factors they rely on are applied to the case.

Although the district court recognized that its discretion concerning the grant or denial of a stay was defined by Carter, supra, the fact is that it gave the State a full and fair opportunity to substantiate its claim that defendant was a danger to the community. (App. D. at 2-26 to 28; 4-25 to 28) The State initially pointed to respondent's alleged "long prior record" as support for its claim (App. D. at 2-19 to 25); after closer inspection of respondent's presentence report, however, the Deputy Attorney General had to admit that "I was in error by making that statement" because his offense history only disclosed a prior adult disorderly persons conviction (the equivalent of a non-indictable common-law misdemeanor) in 1979 and a juvenile complaint for robbery that had been dismissed in 1976. (App. D. at 5-1 to 6-22) He then argued that "the facts of this particular case substantiate [that respondent] committed a very serious crime. On that basis, his dangerousness is established..." (App. D. at 6-23 to 27) Although it did not address this point specifically, the district court obviously rejected it as a basis for granting a stay, as well it should have. Cagle v. Davis, 520 F.Supp. 297, 312 (E.D. Tenn. 1980), aff'd 663 F.2d 1070 (6th Cir. 1981)(fact that petitioner may

have to be retried on a capital offense does not justify a stay of enlargement per se). See also United States ex. rel. Barnwell v. Rundle, 461 F.2d 768, 770 (3rd Cir. 1972). Thus, it is apparent that the record below is devoid of any credible evidence that respondent's enlargement conceivably "places the community at risk" (P 7-1 to 3), and a remand for consideration of that factor would inevitably result in denial of petitioners' motion for revocation on that basis.

A similar conclusion must be reached regarding any claim based upon petitioners' chances of success in the appeal of the district court's order granting respondent's petition for a writ of habeas corpus. Such a rationale for refusing to enlarge a prisoner whose confinement has been adjudged to be illegal or unconstitutional has traditionally been disfavored in any event:

> I can conceive of no principle upon which, after an imprisonment has been adjudged to be illegal, a party can be restrained of his liberty without some new and legal process, so long as the judgment stands. It is said, however, that if these proceedings are not stayed, the relator will be discharged from his imprisonment and will leave the country, and therefore a reversal of the final order would be of no effect. All that may be very true, but yet there is no presumption that there will be a reversal, but the contrary, and the claim of the right to keep this man longer in imprisonment is based simply upon the contention of the district attorney that the law will be held differently by the court of appeals. But until it is so held the discharge is legal.

People ex rel. Young v. Stout, 10 Misc. 247, 31 N.Y. Supp. 421, 1 N.Y. Annot., Cas. 53 (1894), aff'd. without opinion, 144 N.Y. 699, 39 N.E. 858 (1894). Turning to the case at bar, the opinion of the district court below itself rebuts the notion that petitioners have a "great" chance of reversal on appeal far more eloquently than respondent's attorney can. In brief, respondent was denied the

opportunity to call his sole alibi witness in his defense because his attorney filed the notice of alibi out of time. He was precluded from calling the witness even though the prosecutor knew the witness' identity and had actually interviewed the witness a week prior to trial. Significantly, on appeal in the Third Circuit petitioners are not contesting the district court's ruling that respondent's Sixth Amendment right to call witnesses on his behalf was violated; instead, they only take issue with the ruling that this error was not harmless beyond a reasonable doubt, notwithstanding the fact that it took the jury two and a half days to reach a verdict in a case that took only one day to try. Respondent respectfully submits that the district court's opinion clearly indicates that petitioner's chances for obtaining reversal of the granting of the writ on appeal are minimal to non-existent.

In sum, respondent contends that the foregoing facts, when placed in the context of the procedural history of this matter, cast severe doubt on petitioners' assertion that "the motion [for stay of enlargement] addressed only isuess raised in the Carter opinion [and] it is apparent that the denial [of en banc consideration] was based on the dictates of Carter." (P 11, n. 4) Although the motion filed on May 16, 1986 (App. F) did ask for en banc review of the holding in Carter, the brief and appendix filed in support of the motion mirrored the arguments in the district court because it also sought to persuade the Third Circuit that revocation of enlargement was justified under either the Carter test [possibility of flight by respondent] or the four-pronged test that petitioners favor (P 11, n. 3). The Third Circuit denied the motion on May 27, 1986, without even waiting for respondent to file a brief in response.

(App. G) In so doing, the Third Circuit acted with full cognizance of the record possessed by this Court and more. The dispatch with which petitioners' motion was rejected strongly suggests that the refusal to grant en banc consideration was motivated more by the Third Circuit's belief that this case was an unsuitable vehicle for examination of the Carter holding than by mere adherence to the holding or reasoning behind the opinion itself. Any such conclusion by the circuit court is nearly compelled by the instant record and should form the basis per se for denial of a writ of certiorari.

Even if this Court is prepared to ignore what respondent contends is the overwhelming evidence that the orders denying petitioners' motions below turned on this case's particular facts, it should still deny the writ because the Carter opinion construes Rule 23(c) and (c) in a legally and logically proper manner and interprets the rules in a way that does not create conflict with other circuits. It must be kept in mind from the outset that the task that the Carter court set for itself was to interpret the rules by reference to factors that "have...relevance to the federal function in habeas cases." Carter, supra at 997. That task is consistent with the emphasis on principles of federalism and comity that has been a highlight of this Court's approach to habeas cases in general. Wainwright v. Sykes, 433 U.S. 72, 88-90 (1977). It also bespeaks recognition of this Court's belief that the scope of federal authority in habeas cases "is sometimes as much a matter of allocation as it is of analysis" and that "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." Miller v. Fenton, ____ U.S. ____, 106 S.Ct. 445, 452 (1985). The holding that

"the 'special reasons' to which Rule 23(d) refers must, at the very least, embrace those matters which are related to an assurance that the petitioner will appear in response to federal court orders," Carter, supra at 995 (emphasis added), is by its own terms not exclusive; indeed, the court went on to hold that factors such as dangerousness to the community could be considered if they related "to a petitioner's ability to respond to federal process, or which in some other respect relate to the federal interest." Id. at 996-997. Thus the Carter holding does not "require federal courts to blindly order the release of state prisoners" in any given situation. (P13-10 to 13)

Petitioners repeatedly assail the Carter holding as "impractical," "dangerous," "crabbed," and "at odds with... customary practice." Yet it is petitioners who actually fail "to pay heed to the clear intent of the rule in question" (P 13-8 to 9) by ignoring the detailed historical and legal analysis contained in the Carter opinion. By far the most important precedent that Carter draws support from is United States ex rel. Thomas v. New Jersey, 472 F.2d 735 (3rd Cir. 1973), which contains a thorough history of Rule 23(c) and (d) and is cited as the most authoritative interpretation of the key provisions of the rule in nearly every case cited in the petition for certiorari. As noted in that opinion, release of successful habeas petitioners was mandatory until 1967. At that time limited discretion was given to the federal courts and the term "special reasons" was inserted in the Rule.

> But it is clear from the history of the rule prior to the 1967 change that there is still a very strong presumption that a petitioner holding a final judgment that his detention is unlawful should not be left in state custody. The 1967 change was not intended to adopt a general rule in favor of custody

> pending appeal, but only to substitute discretion, to be exercised in limited situations, for what was formerly a mandatory release requirement.

Id. at 743.

Another change made in the Rule was the deletion of the phrase "for appearance to answer the judgment of the appellate court." However, as Thomas pointed out, "no change in substance was intended"; the federal court is still "naturally interested in the availability of the petitioner to respond to its judgment." Id. See also LaFrance, supra at 508. It was this strong interest which formed the basis of the Carter opinion. By focusing on the federal interest in the petitioner's response, the Third Circuit has been able to protect this federal interest without unduly infringing upon traditional state concerns -- protection of state citizens, particular state bail provisions and the functioning of state judicial systems. The Carter approach achieves an equitable federal/state balance in this area.

Unquestionably, the most significant facet of Rule 23(c) as well as the cases that construe it is the heavy presumption in favor of releasing a habeas petitioner once a district court has ruled in his favor. Carter, supra at 994; Thomas, supra at 743; Barnwell, supra at 770. Although petitioners pay lip service to this presumption (P 6-18 to 22), they ignore its basis, i.e., since the initial decision granting the writ means that the petitioner has been imprisoned in violation of his constitutional rights. There is no other basis for the grant of the writ. Thus every day that he continues to be incarcerated is another day that the State has deprived him of his liberty without due process of law. The significance of this fact was described by Justice (then Judge) Cardozo in characteristically eloquent fashion:

> It would be intolerable that a custodian adjudged to be at fault, placed by the judgment of the court in the position of a wrongdoer, should automatically, by a mere notice of appeal prolong the term of imprisonment, and frustrate the operation of the historic writ of liberty. 'The great purpose of the writ of habeas corpus is the immediate delivery of the party deprived of personal liberty.' ...Certain it is, at least, that the writ may not be thwarted at the pleasure of the jailer... Little would be left of 'this, the greatest of all writs' ...if a jailer were permitted to retain the body of his prisoner during all the weary processes of an appeal....

People ex rel. Sabatino v. Jennings, 248 N.Y. 258, 158 N.E. 613, 614 (Ct. App. N.Y. 1927), quoted in Cagle v. Davis, supra at 311. While petitioners may have lost sight of this element of habeas jurisprudence, the cases upon which they rely in their petition certainly did not. It is important to note that in none of the district court cases cited in the petition (P 12-6 to 12) was petitioners' enlargement stayed or revoked; at worst, the factors considered by those courts led them to condition enlargement on the posting of a surety sufficient to ensure petitioner's availability to federal process. See United States ex rel. Taylor v. Redman, 500 F.Supp. 453, 460 (D. Del. 1980)(writ granted on double jeopardy grounds; prisoner released); Sellars v. Estelle, 450 F.Supp. 1262, 1265 (S.D. Texas 1978) (writ granted; prisoner released on own recognizance after 14 years in prison); Hill v. Rose, 579 F.Supp. 1080, 1090 (M.D. Tenn. 1983)(writ granted; execution of appearance bond required); Cagle v. Davis, supra at 312-313 (writ granted; surety required "to assure [his] return to the custody of the state of Tennessee").

Carter, supra at 997, correctly points out that its ruling "does not leave the state without recourse" to resort to the state courts for vindication of traditional state

concerns. See also Thomas, supra at 743-744. Petitioners respond merely by claiming that resort to state civil commitment or pre-trial bail mechanisms is difficult if not impractical. (P. 9 to 10) Such complaints beg the essential question of whether or not the factors relied on in the petition for certiorari are more properly the concern of state courts rather than federal courts that have granted habeas relief. The fact remains that nothing "prevents the State from dealing with a habeas releasee who will be retried as the State will deal with any other State prisoner who has yet to stand trial." Carter, supra at 998. In any event, the difficulties faced by petitioners are nothing compared to the prejudice that would be suffered by respondent, who "is threatened with immediate irreparable injury in the form of continued unlawful incarceration if he is not immediately released." Taylor, supra at 460. Since respondent was eligible for parole only three months after his enlargement became effective under his original sentence (App. Da 4-20 to 24), granting of the requested stay would have meant that in practical terms he would have had to serve the entire custodial sentence imposed pursuant to his unconstitutionally-obtained conviction before the appeal of the district court's order granting the writ was completed.

Petitioners opine that the Carter opinion's construction of Rule 23(c) and (d) is erroneous because those rules should be read in light of Rule 23(b) simply because all three rules use the word "enlargement." (P 10-14 to 23) In fact, the tenets of Carter have nothing to do with Rule 23(b). That particular rule is not even cited in the Carter opinion. That omission is understandable -- Rule 23(b) deals with an entirely different legal situation and embodies entirely different legal standards. It covers unsuccessful petitioners whose State convictions remain

valid. Under those circumstances, continued incarceration is up to the discretion of the court. Aronson v. May, 85 S.Ct. 3, 5 (1964)(Douglas, J.); Petition of Johnson, 72 S.Ct. 1058, 1031 (1952)(Douglas, J.); Ostrer v. United States, 584 F.2d 594, 599 (2nd Cir. 1978). The drafters of Rule 23 certainly understood this distinction and made release presumptive only in Rule 23(c) cases. Petitioners' application of Carter to Rule 23(b) is their own invention and does not impact upon the interpretation of a completely different court rule.

Petitioners also attempt to finesse Rule 23(c) completely by implying that the standards for stays provided in F.R.App.P. 8(a) should apply to cases involving grants of writs of habeas corpus (P 11, n. 3). No case cited by petitioner clearly supports the proposition that Rule 8(a) should apply to the release of successful habeas corpus petitioners, in place of Rule 23(c) and (d). While it is true that the rules of civil procedure can be applied to habeas corpus actions, they are not to be applied when specific habeas corpus rules have been enacted, as is the case with Rules 23(c) and (d). See Harris v. Nelson, 394 U.S. 286, 294 (1969) in which this Court stated, "The practice in the federal courts has conformed with civil practice only in a general sense." See also Jago v. United States Distr t Court, et. al., 570 F.2d 618, 620 (6th Cir. 1978); Barnwell, supra at 769. In Hill v. Rose, supra, the case cited by petitioner, the district court initially considered the question of releasing the petitioner by relying on Rule 8(a). However, in its supplemental opinion, the Court decided the issue by relying on Rule 23(c), stating: "The release of a prisoner pending review of a decision

ordering his or her release by writ of habeas corpus is governed specifically by Rule 23(c), Fed. R. App. P." Id. at 1091. In fact, in a footnote in the opinion, the district court expressed some irritation at the fact that this action was brought under the wrong rule. Id. See also, King v. Zimmerman, 632 F.Supp. 271, 278 (E.D. Pa. 1986).

Petitioners make much of the fact that in Carter, supra at 997, n. 5., the court acknowledged its disagreement with other decisions that "have held that more general 'bail' standards may be considered by a court in regard to the release of a prevailing habeas petitioner." Such an acknowledgement, however, does not imply that a real conflict between the circuits exists because the disagreement reflects a mere inconsistency in dicta regarding the general principle applicable to such cases rather than a conflict on a matter of law or fact that would justify granting a writ of certiorari. In Walberg v. Israel, 776 F.2d 134 (7th Cir. 1985) for instance, the circuit court reversed the district court's denial of the habeas petition but stayed its mandate pending the disposition of the State's petition in this Court. Since the circuit court had not ordered petitioner's unconditional release to start with, it could not even decide "whether Rule 23(b) or Rule 23(c) applies." Id. at 136. In any event, the result of the case turned not nearly so much on the court's construction of Rule 23(c) in dicta as it did on the fact that petitioner had already offered to plead guilty to the very charge for which his conviction was found to be unconstitutional, thus ensuring that he would "remain in prison for at least as long as the Supreme Court takes to act on the state's petition for certiorari..." Id. The court's recognition that the petitioner would remain in

jail regardless of its own action hardly amounts to a true conflict with the Carter holding that questions of dangerousness are more properly a concern of state courts rather than federal habeas courts.

The holding in Lewis v. Henderson, 356 F.2d 105 (6th Cir. 1966) presents even less of a real conflict with Carter. Firstly, it is a 20-year-old pre-Rule 23 opinion that does not even purport to construe the rule of this Court that existed at that time; instead, it considered the motion only under its own local court rule. Id. at 105. Secondly, and even more importantly, that case did not even recognize the presumption of release of a successful habeas petitioner; instead, it relied on an even older case for the proposition that as a matter of policy, "it is by no means clear that as a matter of right and routine a state prisoner should be set at large pending [the State's appeal]." Id. at 106. As such, the Lewis decision clearly has been discredited by more recent cases construing Rule 23(c) and has lost all weight as authority. See Thomas, supra; Cagle v. Davis, supra at 311. In any event, the reason that enlargement was stayed in Lewis, supra at 106, was because defendant faced trial on a separate charge of attempted murder of a police officer. It is disingenuous to argue that reliance on such a factor presents a conflict with the emphasis on a petitioner's readiness to respond to federal process as stressed in Carter.

Finally, petitioner would respectfully remind this Court again that although this case is subject to certiorari jurisdiction, it is nonetheless merely an appeal of an interlocutory order. Cherek v. United States, 767 F.2d 335, 336-337 (7th Cir. 1985). This Court has long held that the

interlocutory nature of an appeal "of itself alone" provides sufficient reason to deny certiorari in all but the most extraordinary matters. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916). The petition in the case at bar does not present such a situation; it simply does not present an important question that has been the subject of conflicting circuit court opinions. More to the point, as noted previously, the ruling that petitioners are seeking from this Court would not even change the result on the very motion that forms the basis for their petition. Furthermore, as of July 24, 1986, the appeal on the merits of the district court's order granting the writ of habeas corpus had been fully briefed by both sides, and the case will apparently be submitted to the Third Circuit on October 27, 1986 -- perhaps even before this Court disposes of this petition. If the granting of the writ is affirmed, then petitioners will be free to attempt to raise the instant issue pursuant to Rule 41 of this Court when the Third Circuit enters a final judgment. Thus, no valid reason exists to warrant this Court's consideration of the isues raised in the petition for certiorari at this time or any time in the foreseeable future.

CONCLUSION

For these reasons, it is respectfully urged that the Petition for a Writ of Certiorari be denied.

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Dated: September 8, 1986